

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
September 19, 2000 Session

**GENERAL CONSTRUCTION CONTRACTORS ASSOCIATION, INC.
d/b/a GENERAL CONSTRUCTION CONTRACTOR ASSOCIATES, INC.
v. GREATER SAINT THOMAS BAPTIST CHURCH, ET AL.**

**Direct Appeal from the Chancery Court for Shelby County
No. 105579-2 Floyd Peete, Chancellor**

No. W1999-00829-COA-R3-CV - Filed October 9, 2000

This appeal arises from a building contract dispute. Owner and the General Contractor disagreed on several issues of cost and construction. When the dispute could not be settled, the parties sued each other for breach of contract. The General Contractor was awarded a judgment and the Owner filed a 'Motion to Alter or Amend/New Trial' not signed by the Owner's trial attorney. The General Contractor filed a 'Motion to Strike' the Owner's motion, stating that an 'attorney of record' had not filed the motion within the required period. Upon receiving a copy of the General Contractor's motion, the Owner's trial lawyer signed the motion. Nevertheless, the trial court granted the 'Motion to Strike.' On appeal, Owner argued that an undisputed 'attorney of record' had signed the motion as permitted under the Tennessee Rules of Civil Procedure. We agree that the trial court's granting of the 'Motion to Strike' was in error and remand this case for consideration of the Owner's 'Motion to Alter or Amend/New Trial.'

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S. and ALAN E. HIGHERS, J., joined.

James H. Kee, Memphis, Tennessee, for the appellant, Greater Saint Thomas Baptist Church.

Regina C. Morrison and James W. Hodges, Jr., Memphis, Tennessee, for the appellee, General Construction Contractors Association, Inc. d/b/a General Construction Contractor Associates, Inc.

OPINION

In May, 1994, General Construction Contractors Association, Inc., d/b/a General Construction Contractor Associates, Inc. (GCCA) entered into a contract with Greater Saint Thomas Baptist Church (Church) to construct a church facility in Memphis, Tennessee.

Construction began on this facility in August of the same year. Problems during the construction increased the cost of the job, and a dispute arose between GCCA and the Church over who was responsible for paying these increases. The dispute was settled with a verbal agreement by the Church to pay part of the increased costs. To avoid future problems, it was decided that all remaining correspondence between GCCA and the Church should pass through a surety company. This company would also pay any bills related to the site work, and receive GCCA's invoices and pay them. Also during this meeting, Church approved the payment of the first "draw" to the surety company.¹

In mid-October, GCCA ceased work on the site stating that additions or corrections to the plans and specifications would be needed before construction could continue. Shortly thereafter, GCCA submitted a second "draw" application to the surety company, including some items included from the first "draw" request, but not yet paid. The Church did take steps to check the second "draw" request, though it never paid any money on it.² In November, an attorney for the Church requested, pursuant to its contract rights, copies of documents related to GCCA's construction work. GCCA responded with a letter stating it was owed several thousand dollars by the Church through its failure to pay its "draw" requests and that "[GCCA would] not continue to do all of the work and not be compensated." GCCA then referred all future correspondence from the Church to its legal counsel. In December, Church notified GCCA it was terminating the contract for "nonperformance." GCCA then filed a mechanic's lien to attach the property. It later filed this action seeking not only the lien amount, but lost profits, and additional damages. The Church filed a counterclaim against GCCA alleging breach of contract and seeking damage.

The trial court, sitting without a jury, found that the Church, and not GCCA, had breached the contract between the parties. As such, the Church was denied relief and GCCA was granted damages. The Church, through attorney James Kee, filed a 'Motion to Alter or Amend/New Trial' on December 30, 1998. It is apparent from the record that the Church intended Mr. Kee to handle the post-trial process and replace Mr. Randy Gardner, the Church's trial attorney.

On January 14, 1999, GCCA filed a 'Motion to Strike' the Church's post trial motion on the basis that an "attorney of record" had not properly filed the Church's motion within the required 30 day period after the final judgment in the case. After receiving a copy of GCCA's motion, Mr. Gardner added his signature along side Mr. Kee's on the Church's 'Motion to Alter or Amend/New Trial.' Upon the trial court's consideration of this issue, the court granted GCCA's 'Motion to Strike' the Church's motion. The Church then filed a 'Motion to

¹ A "draw" is a partial payment for work completed in a construction contract. In this case, a "draw" request would be submitted to the Church. The Church's representative would check and approve all or part of the "draw" request and those approved funds would be paid to GCCA.

² While there is disagreement between the parties over the exact amount owed under both the first and second "draw" request, neither party disputes that at least some amount was owed to GCCA under the second "draw."

Reconsider' with the trial court, asking it to review its decision to grant GCCA's 'Motion to Strike.' After a hearing, the trial court denied the 'Motion to Reconsider' and re-affirmed the 'Motion to Strike.' This appeal followed.³

Upon our examination of the presented issues, we find only one of consequence in this appeal.⁴

- I. Did the trial court err in its ruling granting GCCA's 'Motion to Strike' of Church's 'Motion to Alter/New Trial'?

Signature Issue

We only address in this opinion the trial court's decision granting GCCA's Motion to Strike the Church's 'Motion to Alter/New Trial.' In its 'Motion to Strike,' GCCA stated that Mr. Kee was not an "attorney of record" when he filed the Church's 'Motion to Alter or Amend/New Trial.' As such, GCCA argued that the Church's motion did "not comply with the Tennessee requirements regarding signature and certification of a counsel of record, and should be stricken." The failure by the Church to comply with these requirements was the only basis of GCCA's motion. [GCCA Motion to Strike] GCCA did not address Mr. Gardner's subsequent signature on the motion. The trial court agreed that the Church's 'Motion to Alter or Amend/New Trial' should be stricken and granted GCCA's motion.

Upon review of the record, we find that Mr. Kee's status in this issue is irrelevant. There is no dispute that Mr. Gardner was an 'attorney of record' of the Church. In addition, there is no dispute that Mr. Gardner added his signature to the motion upon being notified of GCCA's 'Motion to Strike.' Rule 11.01 of the Tennessee Rules of Civil Procedure states:

Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, and Tennessee Board of Professional Responsibility number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken ***unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.***

³ After this appeal was filed, GCCA asked this court to grant a partial dismissal on the basis that the appeal was not timely filed because the trial court had granted GCCA's Motion to Strike. It was GCCA's contention that the granting of this motion nullified the Church's Motion to Alter/New Trial and, as such, no appeal was filed within the required 30 days after the entry of final judgment. This court denied the request stating that the timely filing of a motion, regardless of its ultimate disposition in the trial court, tolls the 30 day period until that motion is decided.

⁴ The Appellant presented several additional issues for decision by this court, including requesting several interpretations of the contract language. However, these issues have no bearing on our decision in this case, and we decline to address them.

Tenn. R. Civ. P. 11.01 (emphasis added). Mr. Gardner promptly added his signature to the Church's 'Motion to Alter or Amend/New Trial' as soon as he was notified of his failure to sign it. As such, it is clear to this court that Mr. Gardner, as an undisputed 'attorney of record,' did properly sign the Church's motion as permitted under Rule 11.01. As such, the trial court erred in granting GCCA's 'Motion to Strike' the Church's 'Motion to Alter or Amend/New Trial.'

Our decision in this issue brings a related question before the court. As the trial court granted GCCA's 'Motion to Strike' the Church's 'Motion to Alter or Amend/New Trial,' it never considered the Church's motion on its merits. Rule 4(b) of the Tennessee Rules of Appellate Procedure states:

(b) Termination by Specified Timely Motions in Civil Actions. In a civil action, if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.02 for a new trial; (4) under Rule 59.04 to alter or amend the judgment; *the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.*

Tenn. R. App. P. 4(b) (emphasis added). It is clear upon review of this rule that an appeal may only be made to this court upon "the entry of the order denying a new trial or granting or denying any other such motion." *Id.*; see also *Evans v. Wilson*, 776 S.W.2d 939 (Tenn. 1989). No such order has been entered in this case. As such, this court has no choice but to remand this case to the trial court for its ruling on the Church's original 'Motion to Alter or Amend/New Trial.'

Conclusion

Based on the foregoing conclusions, we hereby remand this case to the trial court for its consideration of the Church's 'Motion to Alter or Amend/New Trial.' Following a ruling by the trial court on the motion, either party would have the option to perfect a timely appeal. Costs on appeal are taxed against the appellee, General Construction Contractors Association, Inc., and their surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE